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State Arts Councils: Some Items for a New Agenda

By MONROE E. PRICE*

THESE are no longer flush times. And one realm in which the lack of prosperity may prove harmful is the area of government support of the arts. Because the expansive middle class patronage of the 1960's is gone, there is a hope that the government, state and federal, will play the role of Maecenas.¹ Yet government intervention is now more cautious and more critical. The need for state support is high. Performing arts companies are in dire straits.² Artists are unemployed. Nonetheless, government officials at all levels are undecided as to how to proceed. In California, for example, after months of scrutiny by a legislative committee³ and after intensive study by the new governor and his aides, the proper role of the state in supporting the arts is still uncharted. A statute has been passed which is brief and vague, which provides the hint of a tone, but little more.⁴

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1. See W. BAUMOL & W. BOWEN, *PERFORMING ARTS—THE ECONOMIC DILEMMA*, 347-86 (1966).

2. See, e.g., *L.A. Times*, Oct. 4, 1974, § 4, at 17, col. 3.

3. See JOINT COMM. ON THE ARTS, CALIFORNIA STATE LEGISLATURE, REPORT (1975). The report can be criticized for attempting to apply too narrow an economic analysis to the issue of government support.

4. See Cal. Stat. 1975, ch. 1192, at 3203-05, *amending* Cal. Stat. 1965, ch. 149, § 1, at 1102-1105. (*former* CAL. GOV'T CODE §§ 8750-58 (West 1966)). It is interesting to compare the tone of the new statute with that of its predecessor. Former section 8751 provided, for example, that the policy of the state was to "establish the paramount position of this state in the nation and in the world as a cultural center," and focused on the public as viewers. In contrast, the new statute states only that it "perceives that life in California is enriched by art." Cal. Stat. 1975, ch. 1192, § 2, at 3204. Former section 8750 reflected the legislative goal that as many people as possible should be involved in the arts: "[M]any of our citizens lack the opportunity to view, enjoy, or par-

This is an appropriate time to try to redefine the state role, making a small virtue out of the horrific vice of penury. What are presented here are not always specific suggestions, as such, but rather the beginnings of an inquiry into the proper function of the state from the perspective of the legal structure and some questions a state arts council might ask. There is much written, these days, about statutes relating to the arts. In the last five years, there has been a relative abundance of literature on various European devices to provide economic justice for artists—primarily the *droit de suite* and the *droit moral*.⁵ In the United States, there has also been a good deal written and said about the tax structure and its impact on the arts.⁶ There has been, perhaps, too little discussion of the relationship between the copyright laws⁷ and the encouragement of the arts. Nor has a great deal been written about the relationship between the state and the foundations and museums that are critical institutions in the arts.⁸ What follows here are some comments on particular areas in which a state arts council might be of utility.

Copyright

Let us begin with an issue that seems so federal in scope that it is beyond state consideration: copyright itself. Does the protection of the

ticipate in living theatrical performances, musical concerts, operas . . . and visual arts, generally [W]ith increasing leisure time the practice and enjoyment of the arts are of increasing importance." Cal. Stat. 1965, ch. 149, § 1, at 1102. The new statute, in contrast, is grounded on the idea that the creative impulse is a much more limited and private event: "The source of art is in the natural flow of the human mind." The legislature also recognizes that "craft and beauty is demanding" CAL. GOV'T CODE § 8750 (West Supp. 1976). Thus, the new section implies that art is not necessarily a function of leisure. The effect of a narrower focus is to convert the broad approach of former section 8751, which called for a joining "with private patrons and with institutions and professional organizations," into a more inward-looking mandate to "[a]ccept only unrestricted gifts, donations . . . from private sources" Compare Cal. Stat. 1965, ch. 149, § 1, at 1103 with CAL. GOV'T CODE § 8753(m) (West Supp. 1976).

5. See, e.g., Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333 (1968); Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968).

6. See, e.g., *Hearings on General Tax Reform Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess., pt. 15, at 6052 (1973) (testimony of Kyran McGrath, director of American Ass'n of Museums).

7. 17 U.S.C. §§ 1-216 (1970 & Supp. IV, 1974).

8. The leading work in this area is M. FREMONT-SMITH, *FOUNDATIONS AND GOVERNMENT: STATE AND FEDERAL LAW AND SUPERVISION* (1965). See also Fremont-Smith, *Impact of the Tax Reform Act of 1969 on State Supervision of Charities*, 8 HARV. J. LEGIS. 537 (1971).

expression of ideas through the copyright laws sufficiently encourage the arts to justify the reliance placed in that mechanism? Congress has the power, under the Constitution, to employ copyright laws to fulfill the rather agreeable goal of encouraging the arts in society.⁹ For most of the nation's history, copyright has been the primary technique available to foster creativity. The notion has been that creativity would be inhibited if an author or artist were not assured, in some way, that a writing, painting or sculpture would, if successful, bring financial return.¹⁰

Incentives for creativity and the role of the government in the creative process have changed. The most important development has been government support of a substantial amount of creative activity. Much writing, though perhaps not the writing that is most worthy of enduring acceptance, is under government contract or grant or financed by foundations indirectly supported through the tax system. The primary incentive for the writing is usually the initial award, not possible subsequent fruits. Indeed, writings produced under hire for the federal government are, by statute, in the public domain,¹¹ and some federal agencies have indicated that this treatment is also appropriate for studies produced for them under contract.¹² Similarly, universities have proposed that work created by their faculties should be copyrighted in the name of the academy. While this proposal is designed to enable the university to reap the harvest of its professors' productivity, there is implicit the suggestion that a salary or grant from the university is a sufficient goad to creativity. All this is not to say that copyright protection is unessential; rather, its place among the tools available to government should be reassessed.¹³

Naturally, there should be proper attribution of a person's work, and the integrity of that work should be preserved. Copyright, however, is not based on an insistence that the original creator of a visual

9. See U.S. CONST. art. I, § 8.

10. Cf. *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966).

11. See 17 U.S.C.A. § 8 (Supp. 1976).

12. See, e.g., 30 Fed. Reg. 9408-09 (1965). The statement of policy promulgated by the Office of Education under the Department of Health, Education and Welfare provides: "Material produced as a result of any research activity undertaken with any financial assistance through contract or project grant from the Office of Education will be placed in the public domain. Materials so released will be available to conventional outlets of the private sector for their use." *Id.*

13. See Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 U.C.L.A.L. REV. 1100 (1971).

work or a play or a piece of music be acknowledged for the work done.¹⁴ Certainly, a copyist should not feel free to alter the original in a way that places the creator in a false light or deleteriously changes or defaces the work. These tort issues, however, are independent of the essence of copyright, namely the monopoly, for a period of time, in the expression of a work.

Perhaps there should be alternate structures to compensate original creators as society uses the product of their work. Since 1909, any person who has permitted a record to be made of a composition has thereby compulsorily authorized any record company to record the same composition or arrangement of the composition at the legislatively set royalty rate of two cents per record.¹⁵ Although the level of the royalty has been subject to attack,¹⁶ there seems to be general acceptance of the idea of a compulsory license in this context. In the area of television, the use of broadcast signals by cable operators has also given rise to compulsory licensing.¹⁷ Supreme Court decisions aside,¹⁸ the Congress will probably enact legislation, following the Federal Communications Commission's recommendation, which would authorize cable systems to use broadcast signals without specific permission, but which would require them to pay a percentage of their gross as a royalty for the privilege.

In the case of recording and television broadcast signals, the author does not control the dissemination of his ideas. There is, however, financial return for their use. One might ask why television signals are different from plays or books or paintings. If the cable analogy were applied to books, an author would be required to permit any publisher to print and distribute a work; the author would be entitled to a preset

14. For example, in *Mazer v. Stein*, the Supreme Court observed: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is . . . that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . ." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). And in *Fox Film Corp. v. Doyal*, the Court noted that "the primary object in conferring the monopoly lie[s] in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

15. See 17 U.S.C. § 1(e) (1970); 1 M. NIMMER, COPYRIGHT § 108.4 (1975).

16. Cf. Lorimer, 2¢ Plain, *Why Pay More?*, 10 U.C.L.A.L. REV. 561 (1963).

17. Cf. Note, *Cable Television and Copyright Royalties*, 83 YALE L.J. 554 (1974); 26 VAND. L. REV. 1314 (1973). This extension of the infringement concept is incorporated in a bill recently passed by the Senate. See S. 22, 94th Cong., 1st Sess. §§ 111 (c)-(d) (1975).

18. See *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

royalty figure, but the pace and method of marketing could not be controlled. Similarly, a composer would not be able to use copyright to control when and by whom a musical composition was played. Nor would an artist, particularly an artist who had authorized a reproduction of a visual work, prohibit others from doing so. It should be remembered, of course, that the artist, author, or composer would have the right to protect against injury to the work or the creator's reputation.

The scraps and particles of compulsory license are important to note because of the adverse impact of copyright laws on the flow of information, on education, and perhaps on creativity itself.¹⁹ At some point the nourishment provided by copyright, the incentive to a particular artist to create, is offset by the cost to the community of less than free access to the creation. In the realm of ideas there is a social interest in widespread dissemination and in encouraging entrepreneurship in publication.

As far as government policy is concerned, and as far as the arts council's policy is involved, some tentative steps should be taken. California's new arts council legislation, for example, provides that "the people of the state desire to encourage and nourish [artistic] skills wherever they occur, to the benefit of all."²⁰ Basic to that policy is the question of how the state or the federal government can best encourage and support the arts. If the current scheme for the establishment of copyright and the compensation of artists is not the best mechanism for such encouragement, changes ought to be considered. Should the state propose a fund in lieu of copyright that would support artists generally rather than reward a given artist in particular? Should the state require that there be compulsory reproduction rights in works that are created pursuant to a grant from the state? Should the state require that there be exhibition of or other access to works that are produced under state subsidy? Should the state aid artists in developing a mechanism for joint licensing, akin to the mechanism that is employed by musicians? Although the ultimate approaches lie with the federal government, there is much that California can do to serve as a laboratory for new ideas.²¹

19. See Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A.L. REV. 1180 (1970).

20. Cal. Stat. 1975, ch. 1192, § 2, at 3204.

21. For discussions of the role the state can play in this area see Goldstein v. California, 412 U.S. 546 (1973); Brown, *Publication and Preemption in Copyright Law: Elegiac Reflections on Goldstein v. California*, 22 U.C.L.A.L. REV. 1022 (1975); Note, *Misappropriation: A Retreat from the Federal Patent and Copyright Preemption Doctrine*, 43 FORDHAM L. REV. 239 (1974).

The Right of Exhibition

Quite close to the copyright issues just described is what might be called a public right to have an important work exhibited. At present, owners of private collections must base their claims of ownership on uninhibited property rights in works that may be acknowledged, quite generally, to be of importance to the community at large. Under our present rather modest incursions into strict property rights, there may be a state claim that an owner may not arbitrarily destroy a valuable work.²² If an individual acquired the Watts Towers, there might be some limitation on the power to pull them down. Environmental considerations now forbid aimless marring of other aesthetic features of the state, such as the coastline.²³

From this incursion it might in turn be possible to say that there is a public right to share reasonably in the aesthetic value of a work of art.²⁴ For example, traditional European concepts require that ownership of a Rembrandt does not include a right to deface the painting.²⁵ Such a limitation on ownership does not necessarily spring from the work itself; it might be found in the relationship of the work to the community. The object is part of the body of society's cultural wealth. One individual, by virtue of temporary custody of the work, does not have the right to mar or destroy it. In addition to this limitation there should be a right of access for important exhibitions and scholarly purposes.

What is suggested here is not a random right of access, but rather a carefully controlled power to ensure that works are not totally or arbitrarily withheld from public view. The implementation of such a right would, of course, involve enormous practical problems, such as deciding what is reasonable, who is to make the relevant determinations, and which museums are eligible, but these are problems a state council might pursue. The right of access would have to be reasonable; it could

22. See N.Y.C. ADMIN. CODE, ch. 8a, §§ 205-1.0 to 207-20.0 (Williams 1971 & Supp. 1975); cf. CAL. PUB. RES. CODE §§ 5003, 5020-33 (West 1972 & Supp. 1975); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1483 n.5 (1975).

23. See CAL. PUB. RES. CODE §§ 27000-650 (West Supp. 1975).

24. Cf. *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

25. Cf. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968).

not overly inconvenience the owner's enjoyment of the work or force additional costs upon him. The risk of loss or damage would, of course, fall upon the museum displaying the work, and no work could be borrowed more often than, say, once every five years.

The right to exhibit is related to the restraint of exportation or the protection of the cultural patrimony of a state or nation.²⁶ In Eastern Europe and the Soviet Union, government permission is required for the export of an object of cultural importance created before 1945.²⁷ The government of France has the power to exercise a right of first refusal or to forbid the exportation of a work.²⁸ Generally these powers are exercised to keep a work within a nation's borders, but it is unclear why it would be considered worthwhile to detain a work within a nation but to withhold from the people of the state the right to see it. In other words, restraints on export sales seem related to requirements that a work be exhibited, and in terms of property rights, the limit on sale is conceptually related to a duty to allow access.

A right to access for exhibition seems much more responsive to the people's needs than does the limited right of access said to exist under French and German law. In Germany and France, the artist has a right of access only to obtain a photograph of his work.²⁹ Although it is not clear on this point, the German law is interpreted to mean that the owner of a work has the power to control exhibition unless there is a contract specifically vesting that right in the artist.³⁰ The right to obtain a photograph, recently provided by statute in France,³¹ recognizes the importance of documentation but does not go far enough toward supporting scholarship or public education.

A right of exhibition would also help to liberate the professional staffs of museums. At present, museums are almost wholly dependent upon the favor of patrons for loans of works; because there is no access to the body of a nation's works, there is a need for an acquisitions policy. A right to exhibit might result in a reduction of financial

26. Note, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANS. L. 689, 705 (1974).

27. Interviews with staff of the Max Planck Institute, in Munich, Germany, Aug. 1975.

28. Note, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANS. L. 689, 706-07 (1974).

29. Interviews with staff of the Max Planck Institute, in Munich, Germany, Aug. 1975.

30. *Id.*

31. *Id.*

pressure on museums. If museums had access to works of art for exhibition purposes, the selection of trustees of the museums might be based on broader grounds.

There are two tax aspects of a right to exhibit which should be mentioned. In England there is presently wide-spread discussion of a personal property tax on works of art that exceed \$250,000 in value. The administration of such a tax might include an exemption for works loaned to public museums for exhibition. In the United States prior to 1969 some courts implied that the owner of a painting could take a charitable deduction for the value of the work for the period of exhibition.³² One could conceive of a regime which extended the rationale for this implication to require that the owner of a work could avoid exhibition only by the payment of a tax.

This last idea may be one whose time has not come. Perhaps its time should never come, but it is the kind of venture about which a state arts council could inquire and in which it could efficiently seek to experiment.

Museums and State Law Enforcement

A legitimate and critical concern relevant to state policy in the arts is the behavior of nonprofit institutions, particularly museums, established within the state. The first complex issue is that of ensuring that museums and other charitable institutions, including foundations, live up to their responsibilities. When Professor Kenneth Karst wrote his article on state and federal supervision of charitable trusts and charitable corporations little more than a decade ago,³³ his list of potential enforcers of such trusts purposely excluded as a supervising litigant the general beneficiary.³⁴ The growing role of the Internal Revenue Service was noted, but noted with suspicion, because the code, Karst stated, was

32. See, e.g., *Passailaigue v. United States*, 224 F. Supp. 682 (M.D. Ga. 1963). This view, which was disputed by the Internal Revenue Service, was foreclosed by Congress in the 1969 Tax Reform Act. See 26 U.S.C. § 170(f) (1970); H.R. REP. NO. 413, 91st Cong., 1st Sess. (1969). Treasury Regulation section 1.170-1(d) provides: "Section 170(f) and this subparagraph have no application in respect of a transfer of an undivided present interest in property. For example, a contribution of an undivided one-quarter interest in a painting with respect to which the donee is entitled to possession during three months of each year shall be treated as made upon the receipt by the donee of a formally executed and acknowledged deed of gift." Treas. Reg. § 1.170-1(d) (2)(b), T.D. 7207.

33. See Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433 (1960) [hereinafter cited as Karst].

34. See *id.* at 449.

"not originally designed to prevent breaches of fiduciary duty, but rather to prohibit the use of the exemption as a device for private gain."³⁵ Professor Karst described the limited function of cotrustees,³⁶ of founders, and of substantial donors³⁷ in enforcing the terms of charitable trusts. The preeminent role of the state attorneys general was also described, although the article related in detail how the structure and budgeting of their offices make them unequal to the task.³⁸

To remedy the need for closer surveillance of charitable trusts and charitable corporations, Professor Karst suggested a state board of private charities.³⁹ Such a board would maintain a registry of all charities operating in the state, collect and evaluate periodic reports, investigate possible breaches of fiduciary duty, and seek remedial action in the appropriate court. More affirmatively, the board would assist charity managers so that they could bring their activities into a closer harmony with the social and economic needs of the people of the state. Such a board could assist in the regeneration of obsolete charities and the consolidation of small and inefficient ones. The board would develop and enforce standards for solicitation and cooperate with state and federal tax officials to ensure that no abuses resulted in the exploitation of the exemption for purely private gain.⁴⁰

The Karst solution is an elegant and elaborate one, but no state has acceded to its charms. Some states have strengthened the office of the attorney general and have established registries of trusts.⁴¹ From time to time, the officials in a particular state have become increasingly vigilant in monitoring adherence to charitable purposes and improving deaccession procedures. Generally, the pattern at the state level remains virtually the same as it was in 1960 and for many years before that. As Karst noted, however, "the continued existence of the institutions of private charity will depend in considerable measure on public confidence in the efficiency of those institutions."⁴² The state arts council should be responsible for inspecting the efficiency of museums and recommending ways of improving their policies and thereby their performance. Possible responses include enlarging the class of persons

35. See *id.* at 443.

36. See *id.* at 443-45.

37. See *id.* at 445-49.

38. See *id.* at 449-60.

39. See *id.* at 476.

40. See *id.* at 477.

41. See Kutner & Koven, *Charitable Trust Legislation in the Several States*, 61 NW. U.L. REV. 411, 413-20 (1966).

42. *Id.* at 434-35.

entitled to enforce a charitable trust or broadening the scope of interest of an agency exercising surveillance over charitable institutions.

A special logic and a misplaced fear underlie the rule excluding beneficiaries from the list of possible enforcers of charitable trusts. The logic begins with the definition of a charitable trust and its fortunate insistence on a broad and indefinite class of beneficiaries.⁴³ Since the beneficiaries are indefinite, there is no specific self-interest that can be counted upon for the enforcement of the trust.⁴⁴ A more official watchdog, it is often said, is necessary.⁴⁵ As a consequence, the state attorney general is usually given the responsibility of protecting the interests of the uninformed beneficiary.⁴⁶ The next step in the reasoning is protective of the trustees and the state official: because the state attorney general has the responsibility of protecting beneficiaries, the latter should be precluded from enforcing the trust on their own behalf, unless they have a specific interest that is more precise than that of the average beneficiary (the average museum goer, in the case of a museum).⁴⁷

These arguments against suits by beneficiaries have a long history.⁴⁸ Beneficiaries are barred and should be barred, it is said, because widespread citizen litigation would unduly harass trustees.⁴⁹ In a case involving the Barnes Museum,⁵⁰ for example, the court dismissed the action brought by a newspaper reporter to enforce a charitable trust, even though the reporter had the consent of the state attorney general. In explaining this result, the court quoted an early decision:

There are many authorities in England and in this country which deny the right of private parties . . . to compel the performance of a duty to the public. The reason is, that if one individual may interpose, any other may, and as the decision in one individual case would be no bar to any other, there would be no end to litigation

43. See RESTATEMENT (SECOND) OF TRUSTS §§ 348, 364 (1959); G.G. BOGERT & G.T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS § 55, at 206 (5th ed. 1973).

44. See A. SCOTT, LAW OF TRUSTS § 391, at 697-700 (abr. 1960) [hereinafter cited as SCOTT].

45. See, e.g., *id.*

46. See RESTATEMENT (SECOND) OF TRUSTS § 391, comments *a-f* (1959); SCOTT, *supra* note 44, § 391, at 697.

47. E.g., RESTATEMENT (SECOND) OF TRUSTS § 391, comment *c* (1959) (the minister of a church for the benefit of which a charitable trust is created can bring suit against the trustee for enforcement of the trust).

48. Cf. SCOTT, *supra* note 44, § 391, at 697-98.

49. See *id.* § 399, at 699.

50. *Wiegand v. Barnes Foundation*, 374 Pa. 149, 97 A.2d 81 (1953).

and strife. The general laws of order so necessary to good government forbid anything like this.⁵¹

It is also argued that a system that depended on beneficiaries for enforcement of charitable trusts would founder because no single beneficiary would have enough of an interest in the performance of the trust to meet the litigation costs involved in obtaining adherence to the trust's terms.⁵²

These last two arguments are now coming under increasing scrutiny. Charitable institutions are not the only public institutions that wish to avoid the hazards of frequent litigation by self-appointed attorneys general. There is a certain harmony about an institutionalized system of checks and balances, but we are now in an era of citizens on white horses, a time when accountability has become the watchword. It may be argued, of course, that it is unappealing to divert funds from the operation of the charity to the defense of litigation, but the argument applies as much to public governmental functions as to private charitable ones. In addition, beneficiaries as a class are now more capable of representing their own interests, primarily as a result of the growth of public interest law firms. These new organizations, also children of charity, have as their *raison d'être* the representation of the unrepresented, isolated people who have an interest in obtaining the services that, in theory, are due them.⁵³

51. *Id.* at 153, 97 A.2d at 83, quoting *Buck Mountain Coal Co. v. Lehigh Coal & Navigation Co.*, 50 Pa. 91, 99 (1865).

52. See Karst, *supra* note 33.

53. Few cases have recognized the need for reexamining the historic policy of refusing to permit beneficiaries, as such, to sue to enforce a trust. The broadest breach in traditional doctrine seems to be taking place in New Jersey. In one case, citizens attempted to prevent the local hospital from changing its location from its downtown site to a nearby suburb. The citizens contended that the charitable trust had been created for the purpose of ministering to the residents of the city, especially the sick poor, and that the aid was to be administered in physical facilities located within the municipal limits. *Paterson v. Paterson Gen. Hosp.*, 97 N.J. Super. 514, 235 A.2d 487 (Ch. Div. 1967); cf. *Township of Cinnaminson v. First Camden Nat'l Bank & Trust Co.*, 99 N.J. Super. 115, 238 A.2d 701 (Ch. Div. 1968). In *Township of Cinnaminson* the settlor had established a trust to construct a library for Cinnaminson Township. In 1945, a court had yielded to the trustees who wished to use the funds for the enhancement of two nearby libraries instead. In the 1960's, population patterns changed; the township built a library, and its citizens wished the return of the Lippincott Trust. They sued for the annulment of the previous *cy pres* decree. *Id.* at 119-23, 238 A.2d at 703-04.

In each case, the court upheld the right of the citizens to bring the action and also upheld the decision of the trustees. The court in *Paterson* was firm in its reasoning: "[I]n this State, and throughout the country as a whole, supervision of the administration of charities had been neglected." 97 N.J. Super. at 527, 235 A.2d at 495. "While

There are seven states in which beneficiaries are authorized by statute to enforce charitable trusts, though the language is vague in almost every case.⁵⁴ What is astonishing to the reader of Scott⁵⁵ and the believer in traditional trust law is the absence of harassment of trustees in these states.⁵⁶ Explanations are possible. It may be that the states that have given the beneficiary the right to sue are not populated by

public supervision of the administration of charities remains inadequate, a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decidedly in the public interest." *Id.* at 528, 235 A.2d at 495.

In no other recent decision has a court been as specific as the New Jersey court in extending the standing of citizens to enforce charitable trusts, but there are other straws in the wind. A recent California case indicates that some state courts may be reaching a similar result by bending the traditional rule that beneficiaries cannot enforce a charitable trust unless they can show a specific interest which is different from that of any vague beneficiary. See note 47 & accompanying text *supra*. Thus, it may be that the "special interest" exception is being expanded. In one recent California case, a settlor had donated land near Escondido for the benefit of its boy and girl scouts. The trust conveyed the land to the City of Escondido, altering the nature of the restriction. The Council of Boy Scouts, on behalf of its members, sued to enforce the donor's intent. The court held that the plaintiffs had standing to bring suit against the holder of the trust property. The court found that "the need of the boys and girls for representation is at least as great as that of the general public. We think that interest can best be met by those . . . directly concerned . . ." *San Diego Court Council v. City of Escondido*, 14 Cal. App. 3d 189, 196, 92 Cal. Rptr. 186, 190 (1971). The boy scouts of Escondido constitute a narrower class than its museum goes, and for that reason, the case may not provide persuasive authority for the standing of museum goes to enforce charitable trusts. But it would not be surprising if based on that case, a California court in the future gave standing to a member of a museum who stated an interest more specific than residence in the community where the museum was located.

In *Stern v. Lucy Webb Hayes Nat'l Training School*, a recent federal case having potentially far-reaching effects concerning the fiduciary duties of trustees of nonprofit, charitable organizations, the plaintiffs brought a class action on behalf of the patients of Sibley Hospital in Washington, D.C., to "challenge the conduct of the trustees operating this charitable institution on a theory of breach of trust." *Stern v. Lucy Webb Hayes Nat'l Training School*, 367 F. Supp. 536, 540 (D.D.C. 1973). In the decision following the trial on the merits, the court noted: "The management of a non-profit charitable hospital imposes a severe obligation upon its trustees. A hospital such as Sibley is not closely regulated by any public authority, it has no responsibility to file financial reports, and its Board is self-perpetuating. . . . [A]nd the patients lack meaningful participation in the Hospital's affairs." 381 F. Supp. 1003, 1019 (D.D.C. 1974). This same observation applies equally to organizations such as museums and those whom they are ostensibly intended to serve.

54. See Kutner & Koven, *Charitable Trust Legislation in the Several States*, 61 NW. U.L. REV. 411, 423-25 (1966).

55. See notes 44-49 & accompanying text *supra*.

56. An analogy can be drawn between the standing of a beneficiary to enforce a charitable trust and the recently liberalized standing of listeners to intervene and challenge the performance of a broadcaster when his license is scheduled for renewal. See *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

interesting charitable trusts or charitable corporations. Alternatively, it is possible that the personality of the citizenry of those states is not marked by the propensity for litigiousness that is found elsewhere. Finally, though least likely, it could be that the existence of statutes which provide such an onerous enforcement mechanism has encouraged the trustees to stick more closely to the terms of the trust. The absence of the largest states from the list suggests that one of these explanations may indeed have some relationship to the phenomenon of absence of suits by beneficiaries.

Beneficiary enforcement does not necessarily mean harassment, but it can mean more frequent and less controlled occasions for judicial scrutiny of trustee action. It is important to emphasize that the broadening of eligibility to invoke the judicial remedy does not, at least in theory, change the standard of performance expected of a trustee. The discretionary latitude of a board remains the same although the occasions for scrutiny to determine whether there is a breach of fiduciary duty become more frequent. Beneficiaries might sue museum trustees to prevent illegal acts, to enjoin the disposition of work at less than fair market value, to enjoin acts in violation of the terms of a trust, to stop acts of self-dealing, or to recover from a trustee who has benefitted from an opportunity that should have been the museum's. There is, of course, the danger that expanding the occasions for scrutiny would make a board more timid or would discourage qualified persons from serving, but legislatures and courts could fashion limits to remedies that would render such results less likely. Beneficiary suits, for example, could be limited to injunctive relief, foreclosing the possibility of the imposition of liability upon the trustees as individuals.

A second focus for change in enforcement patterns relates to the current legislative debates and judicial activity concerning the federal tax exemptions of museums as charitable institutions.⁵⁷ The state arts

57. On the general question of charitable deductions see Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972); Rabin, *Charitable Trusts and Charitable Deductions*, 41 N.Y.U.L. REV. 912, 920-25 (1966); Sacks, *The Role of Philanthropy: An Institutional View*, 46 VA. L. REV. 516, 524 (1960); Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970) [hereinafter cited as Surrey]. For debates over tax expenditures see Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244 (1969); Surrey & Hellmuth, *The Tax Expenditure Budget—Response to Professor Bittker*, 22 NAT'L TAX J. 528 (1969); Bittker, *The Tax Expenditure Budget—A Reply to Professors Surrey and Hellmuth*, 22 NAT'L TAX J. 538 (1969). For discussions of related problems see Vickrey, *One Economist's View of Philanthropy*, in PHILANTHROPY AND PUBLIC POLICY 31

council could ask a similar question about state exemptions. Two current issues are of importance. First, the Internal Revenue Service has begun to act on the idea that its duty to preserve the fisc means that it has some obligation to examine the conduct and policy of exempt institutions and to ensure that those entities are not used as shields for private transactions. Second, as a result of the debates leading to the 1969 Tax Reform Act, Professor Surrey's analysis of federal tax reform⁵⁸ has taken root.

In some recent cases, individual citizens have successfully challenged the issuance of exemptions to organizations whose activities contravene federal legislative or constitutional norms,⁵⁹ primarily because of racial discrimination. The decisions in these cases have important ramifications for exempt institutions generally. They enlarge the field of persons entitled to enforce or otherwise affect the conduct of charitable trusts. It is one thing for the Internal Revenue Service to try to shape or influence the policy of exempt organizations or for the state attorney general to enforce certain provisions of a trust; it is quite another when a large class of citizens can compel the appropriate official to take action consistent with his responsibility.⁶⁰

The implications of the exemption cases for state policies are interesting. In these days of shifting judicial climates, the cases may be

(F. Dickinson ed. 1962); Stone, *Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy*, 20 U. SO. CAL. 1968 TAX INST. 27; Wolfman, *Federal Tax Policy and the Support of Science*, 114 U. PA. L. REV. 171 (1965).

58. See Surrey, *supra* note 57.

59. See, e.g., *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). In *Green*, a three-judge court held that "Federal tax exemptions and deductions are generally not available for activities contrary to declared Federal public policy," at least when those activities contravene an impressive tradition of policy against government support for racial segregation in the delivery of education. 330 F. Supp. at 1154. At issue was the validity of exemptions and deductions for segregated academies that were the creatures of *Brown v. Board of Education*, 347 U.S. 483 (1954). Several months after *Green*, another three-judge court in the District of Columbia held that the deductibility of contributions to a fraternal organization that discriminated against blacks violated Title VI of the 1964 Civil Rights Act. The court recognized the standing of an individual potential member to force the secretary of the treasury to deny subsidies to an organization that violated federal antisegregation policy. See *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972).

60. In this sense, *Green* and *McGlotten* are federal versions of *Ames v. Attorney General*, 332 Mass. 246, 124 N.E.2d 511 (1955). In *Ames*, the plaintiffs unsuccessfully sought to force the state attorney general to view more favorably their interpretation of the trustees' responsibility in a case in which a large botanical library and herbarium was to be moved from Boston's Arnold Arboretum to the premises of Harvard College.

idiosyncratic and the doctrine involved incapable of expansion.⁶¹ On the other hand, these decisions are part of a family that includes *Tank Truck Rentals, Inc. v. Commissioner of Internal Revenue*,⁶² in which the Internal Revenue Service disallowed a business deduction for the payment of fines for illegal acts.⁶³ It may be that tax enforcers, on their own or with judicial prodding, become even more assertive in the charitable organization field, on the basis of *Green v. Connally*⁶⁴ and its progeny. They might prospectively enlarge the class of activities contravening public policy as expressed in statute, constitution or treaty, which are inconsistent with the retention of exempt status. States might do the same in accord with *Pitts v. Department of Revenue*,⁶⁵ with respect to both income and property tax exemptions.⁶⁶

The issue, of course, is important to museums and similar charitable organizations only if these cases imply a range of substantive standards that the tax authority can and should enforce. The nature and extent of such standards are largely a matter of speculation. Racial discrimination may be *sui generis*, and the actions of the courts and the Internal Revenue Service in recent cases may represent the outer limit that can be expected. The federal policy against racial discrimination is more sharply etched and stronger in its constitutional underpinning than other policies affecting exempt institutions such as museums. There are, however, several museum-related activities which could give rise to a challenge to an exemption. Such a challenge might be mounted if it can be established that: (1) a museum's employment practices are

61. The Internal Revenue Service, however, did adopt the holding of *Green* in Rev. Rul. 447, 1971-2 CUM. BULL. 230.

62. 356 U.S. 30 (1958).

63. See M. Fremont-Smith & A. Yarmolinsky, Preserving the Private Voluntary Sector: A Proposal for a Public Advisory Commission, May 9, 1975 (draft paper prepared for the Commission on Private Philanthropy and Public Needs).

64. See note 59 *supra*.

65. 333 F. Supp. 662 (E.D. Wis. 1971). See note 66 *infra*.

66. Given a substantive standard that should be critically relevant, within the meaning of *Green* and *McGlotten*, to the continuance of the exemption or the honoring of a deduction, those cases hold that anyone who suffers injury in fact, economic or otherwise, can bring suit, so long as "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). A general interest in the subject matter is insufficient, but individual group members who are specifically affected do suffer adequate injury. Compare *Sierra Club v. Morton*, 405 U.S. 727 (1972), with *United States v. SCRAP*, 412 U.S. 669 (1973). For charitable institutions, the class to be protected by the exemption statute might include those very beneficiaries who are excluded from enforcing the trust under state law.

discriminatory on the basis of either race or sex; (2) the self-perpetuating board of a public institution has discriminated systematically in its self-perpetuation on the basis of race or sex; (3) a museum's policy denies adequate access to interested members of the public; (4) a museum's acquisition policy or practice systematically contravenes federal policy, as expressed in statutes or treaties; (5) a museum demonstrates a pattern or practice involving complicity in overvaluation of contributions for the purpose of obtaining charitable deductions;⁶⁷ or (6) the admissions policy of a museum makes it impossible for poor people to attend.⁶⁸

State Policy and Governance of Museums

Enforcement mechanisms are a faulty substitute for structural reform. Enhancement of enforcement may be, in fact, only a technique

67. Each of these conditions presents special problems that make it less than likely that a court would uphold an action to force investigation of the exemption or that the IRS would or should act on its own. The employment discrimination situation presents the easiest case in terms of the existing precedents, though it may be argued that the Civil Rights Act of 1964 provides an exclusive remedy, as well as setting forth the substantive standard. In the case of a board of directors, standing may be denied because it is unclear what statute should be the basis for determining who is arguably within the zone of protected interests. The IRS, of course, could act on its own by issuing a ruling. The same problem occurs in the case of access to the museum, though on that issue there is already developing IRS case law. With respect to an object illegally acquired in contravention of a treaty, it is more likely that a person or group could assert the specific zone of interest that would provide standing.

68. Recent cases demonstrate that the potential for litigation on these questions is not totally imaginary. In *In re Estate of Bishop*, the famed Bishop Trust was before the state supreme court for an accounting. One justice stated that the foundation ought to change the criteria for appointment to the board and for admission to its school in light of *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971). See *In re Estate of Bishop*, 53 Haw. 604, 616, 449 P.2d 670, 677 (1972) (Abe, J., concurring). The trust document provided that only Protestants should be appointed to the self-perpetuating board, and the board had interpreted the trust document as restricting admission to children of native Hawaiian descent. In a federal case in Wisconsin, the court extended *Green* by granting an injunction against a state taxing authority, forbidding it from granting preferential tax treatment in the form of income and property exemptions to organizations that discriminate on the basis of race. The court held that a "tax exemption constitutes affirmative, significant state action in an equal protection context where racial discrimination . . . is claimed." *Pitts v. Department of Revenue*, 333 F. Supp. 662, 668 (E.D. Wis. 1971).

Litigants have tried to use the exemption conferral as the basis of suit in circumstances not involving charges of racial discrimination. Thus far these attempts have failed. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Eastern Ky. Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974); *Bright v. Isenbarger*, 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (1971). Increasingly, it may be expected, litigants attempting to require trustees to conform to their notions of what

for triggering reform; as a consequence, an arts council might find it advisable to concern itself more directly, with the form of governance of museums. The present condition is that museums characteristically represent a context in which a public trust, largely publicly supported, is vested in individuals over whom the public has virtually no control. Wealth and status, independent of other characteristics, can find their place. While there is nothing wrong with those characteristics, it is wrong to have a system of museums dependent on wealth, just as it would be wrong to have a system of public education dependent on wealth. The critical point is to develop a tradition in which collection and donation of gifts to museums are not accompanied by expectations of control.

A long-range inquiry into the state's role in affecting the governance of museums would start with a look at the existing kinds of techniques for governance. Within California, there are museums that are administered directly by a city council;⁶⁹ there are museums that are totally public, but have a commission-type board;⁷⁰ and there are museums, like the Los Angeles County Museum of Art, that are a unique mixture of public and private features, with the county paying operating expenses and a private governing board making policy regarding acquisitions and exhibitions.⁷¹ We need to know what difference the mode of

constitutes the public interest will be using the exemption as a technique to gain entry into court. The vitality of this approach will be limited, but it is difficult at this point to say what the limits will be.

69. The director of the Long Beach museum, for example, is appointed by the city council. The museum has no board of directors, and decisions except those of major financial nature are made by the director in consultation with the museum staff. The Long Beach Municipal Arts Commission serves in an advisory capacity. The city council provides funds for the operation and maintenance of the museum, along with a certain amount for exhibitions. The museum has three support groups which provide both money and hours. Since the Long Beach museum emphasizes traveling exhibitions, there is only a small acquisition fund, which comes mostly from outside sources. See LONG BEACH, CAL., MUNI. CODE § 2340 (1955).

70. The Barnsdall Gallery, for example, is controlled by the Municipal Arts Department of the City of Los Angeles. It is presently the city's only municipally controlled operating center for exhibition. The gallery is under the direction of an art coordinator, who is appointed pursuant to a civil service examination. Funding comes from city taxpayers by way of appropriations of the city council, and supplementary funds are provided by a supportive citizens group known as the Municipal Art Patrons. Ultimate responsibility for gallery policy rests with the general manager of the Municipal Arts Department. As a practical matter, however, most decisions are made at the gallery level. See LOS ANGELES, CAL., CHARTER §§ 165-66 (1975).

71. The relationship of the Museum Associates and the county is described in section 210.2 of the Los Angeles County Administrative Code, which states: "Subject to the supervision of the board of supervisors, the Department of the Museum of Art shall

governance makes in terms of a variety of values. First we must determine how important the form of governance is in preserving a tradition of independence and excellence in the museum's growth. Second, we must establish to what extent the form of governance reflects the role of wealth in shaping the museum's programming and policy. Perhaps no changes are needed, but as part of its role in encouraging the arts in California, the council must look at the way museums are governed.

Miscellaneous Issues

An agenda of really important questions that touch on the role of the state in the arts is quite long, and the job that remains to be done is extensive. We must determine how the state can better use existing facilities to support the arts, how it can strengthen its graphic arts program, how it can ensure better access to auditoriums in state buildings for cultural activities, and how it can encourage a program of ticket subsidization that will make the purchase of tickets to theater, music, and dance events more feasible for those in low income groups. There should be more opportunity for the poor, the young, and the aged to attend significant cultural events.

Study should also focus on how the state can enhance the rights of artists, provide better information on contractual and tax issues, regulate relations with dealers and purchasers of works of art, and furnish technical assistance on issues such as copyright. Indeed, the California Arts Council might assist by strengthening service organizations de-

be under the regulation and control of Museum Associates, a nonprofit corporation . . . in all matters connected with the management, operation, and maintenance of the Los Angeles County Museum of Art." LOS ANGELES COUNTY, CAL., ADMIN. CODE § 210.2. Thus the museum is a department of the county, the director is a department head, and the employees are considered employees of the county.

Pursuant to a 1958 contract between the county and the Museum Associates, the county provided the land upon which the Museum Associates built the structures now comprising the museum. Those buildings, upon completion, were donated to the county. Again under the contract, the county delegated the responsibility for the "management, operation, maintenance, and regulation," of the museum to the board of directors of Museum Associates. Additionally, the county agreed to bear the cost of the operation and maintenance of the museum. Acquisitions, for the most part, are the responsibility of the Museum Associates and independent sources.

Under the language of section 210.2 of the Los Angeles County Administrative Code, the board of supervisors would seem to have the authority to exercise some oversight concerning the operation of the museum. Functionally, however, that authority is only nominal, and the directors of Museum Associates operate as an autonomous body once they have received funding from the county. The board is self-perpetuating. See CAL. PUB. RES. CODE §§ 5120-32 (West 1972).

signed to perform these functions for artists. Also, the state should strive to improve its contribution to the arts through its building program. "Whoever builds an unsightly house," someone once wrote, "insults the community, wrongs his neighbors and detracts from the common weal." The State of California has too often built unsightly houses; some mechanism is needed to change the current policy. Because the state's construction program is so vast and varied, it can provide a significant contribution to the arts. The state must learn more about programs to segregate a small percentage of every construction budget for the arts and to ensure consideration of murals, public sculpture, or other art forms in major new buildings.⁷² It needs to know how to play a stronger part in historic landmark preservation.⁷³ At present, local commissions, without adequate resources, are required to do a herculean job. Undoubtedly, more funds are needed to assist communities that seek to retain visible emblems of the past; but there is something even more specific that can be done by the arts council. Often, historic landmark buildings become artists' studios or the homes of art institutions, providing an economic base for the buildings' continued vitality. The council could adopt a guideline encouraging the use of its resources for such indirect landmark preservation purposes. The recently passed Arts and Artifacts Indemnity Act⁷⁴ was enacted without certain provisions, currently still in committee, which would provide operating funds for valuable institutions such as art museums, natural history museums, and maritime museums. Yet there will be fundamental problems with the Act even if these provisions are added. First and foremost, the funds available to California will not be sufficient to meet the pressing claims of the state's museums. Second, there will be difficult problems of definition involving the eligibility for federal support of particular institutions. Third, there will undoubtedly be concern about how the funds are used and to what kinds of museum programs they are applied. The state must be more fully aware of the issues involved in operating support for museums. Perhaps the state should submit amendments to the Brademas bill; perhaps it should develop its own museum services legislation. It is on this kind of issue that the advice of the California Arts Council could be invaluable. As the states become much more deeply involved in the patronage of the arts, there will be great need for interstate cooperation. The California Arts

72. See *Art and the Law*, Apr.-May 1975, at 1, cols. 1, 3.

73. See notes 22-23 & accompanying text *supra*.

74. Act of Dec. 19, 1975, Pub. L. No. 94-158, 94th Cong., (1975).

Council should work jointly with other state commissions, perhaps in a western consortium, perhaps with several of the major commissions such as that of New York. Certain arts enterprises are so major, in terms of planning, cost, and impact, that the coordinated operation of several state commissions would be warranted.

Our system of charitable deductions is now the principal means of public support of the arts.⁷⁵ Yet there are those who are skeptical about the impact of this system.⁷⁶ By relying on tax-induced contribution, we place the center of strength for our arts institutions with the rich.⁷⁷ It is their taste that becomes the museum's taste, and thence the community's. As a nation we have always depended on the bounty of the rich and the powerful to build our cultural institutions, but in this century, we have rewarded such gifts with generous tax savings. Perhaps it is time that we review our method of building public collections to determine whether more democratic means would yield institutions that are freer of idiosyncratic and individual taste. The California Arts Council could do a great public service by undertaking such an inquiry.

Government has a role in encouraging the arts and providing a climate in which artists can create and market their works. Beyond that function, it may be difficult to justify direct aid to artists. The *droit de*

75. Charitable contributions, particularly those of great size, are not "private"; they are part private and part governmental. As Karst put it, "when the public contributes [to charity] indirectly through such devices as tax exemptions, its stake in private philanthropy is . . . real." Karst, *supra* note 33, at 433-34.

76. In terms of museums, the current system of federal subvention has aspects that are increasingly subject to scrutiny. One commentator has observed, "The amount of public funds which a private person can allocate depends on his marginal tax bracket and hence his income position and wealth generally." Surrey, *supra* note 57, at 386. Another has remarked that the system is "undemocratic because it subsidizes 'much more heavily the charities favored by the wealthy as distinct from those appealing primarily to the poorer contributors.'" Rabin, *Charitable Trusts and Charitable Deductions*, 41 N.Y.U.L. REV. 912, 922 (1966), quoting Vickrey, *One Economist's View of Philanthropy*, in *PHILANTHROPY AND PUBLIC POLICY* 54 (F. Dickinson ed. 1962).

77. See H. CAHILL, *NEW HORIZONS IN AMERICAN ART* 35-38 (1941). "The emphasis on masterpieces is primarily a collectors' idea and is related to a whole series of commercial magnifications which have very little to do with the needs of society . . ." *Id.* at 35. "Our society today does not yet afford a life in which art is intimately connected with everyday vocations. Our democracy has not yet become the life of 'free and enriching communion' of which John Dewey speaks . . ." *Id.* at 36. "I do not think that we have weighed sufficiently the meaning of the change from a handicraft to a machine method of production, probably the most revolutionary change in the history of human society. Its effect upon the arts has been catastrophic. It has divorced the artist from the usual vocations of the community and has practically shut off the average man from the arts." *Id.*

suite is an example.⁷⁸ Art, at least some art, has appreciated in value, sometimes quite remarkably. Individual artists have considered it unacceptable that a purchaser should reap the profit, having purchased the art from the struggling artist for a pittance, or having purchased the work wisely for a sum that was not insignificant but turned out to be far below the market value a decade later. It is not certain that the government has a role to play in addressing the balance between purchaser and seller of works of art. It is painful that Robert Rauschenberg is not sharing in Robert Scull's proceeds from the sale of the artist's works, but the pain is not of a sort that calls for government regulation as opposed to the working of the market place. On the other hand, the state can play a very constructive role in modifying existing decisional law which impedes the bargaining of artists in the market place. Recently, for example, legislation addressed the judicial assumption that the sale of a tangible object customarily included with it transfer of rights to reproduce the object.⁷⁹

A state arts council might also be interested in intervening to help modulate the effect of one federal tax deduction on giving within the state. It appears, from the literature involving law and the arts,⁸⁰ that the creator of paintings is somehow discriminated against by the Internal Revenue Code. There is no charitable deduction for a work of art given to a museum by its creator, except for a deduction for the cost of materials. A collector, of course, has the charitable deduction and often uses it prudently to minimize his tax obligation.⁸¹ One reason

78. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333 (1968).

79. For example, in *Pushman v. New York Graphic Soc'y*, the court refused to grant an injunction against reproduction of an uncopyrighted painting where the artist who sold it "took no steps to withhold or control that right." *Pushman v. New York Graphic Soc'y*, 287 N.Y. 302, 308, 39 N.E.2d 249, 251 (1942). Subsequently the New York legislature declared that the right of reproduction remains with the artist "unless such right is sooner expressly transferred by an instrument, note, or memorandum in writing signed by the owner of the right . . ." N.Y. GEN. BUS. LAW § 224 (McKinney 1968); accord, Cal. Stat. 1975, ch. 952, §§ 1-2, at 2407-09.

80. See, e.g., F. FELDMAN & S. WEIL, *ART WORKS: LAW, POLICY, PRACTICE* 823-24 (1974).

81. But is this really so absurd a set of circumstances? Generally, the producer of an object, someone who devoted his labor in creating the finished product, cannot deduct the fair market value of the contribution. See INT. REV. CODE OF 1954, § 170(e); Treas. Reg. §§ 1.170 A-1(g), 1.170 A-4. A lawyer cannot deduct the office value of a memorandum which he has contributed; a housepainter cannot deduct the value of refinishing the local church; a boy scout leader cannot deduct the value of the hours donated to improving the quality of America's youth. Presidents cannot deduct the value of their letters; musicians can no longer deduct the value of their scores. Thus, there is not discrimination against artists as artists. Even if there were discrimination,

that the deduction should be reinstated is to give artists an incentive to make gifts to museums, and here the state interest seems clear, since it is the public at large that is affected. A committee of the New York City Bar has prepared a study of the effects on donations of the 1969 amendment to the tax laws and has concluded that the deleterious impact on contributions by creators has been substantial indeed.⁸² That determination, of course, raises questions concerning the way in which the government wishes to develop public collections of the works of living artists: Is the deduction a suitable mechanism for encouraging the process? Or are direct grants to the artist, or grants to the museum for purchase, more effective methods?⁸³

Zoning and housing for artists is also a matter for public concern.⁸⁴ It has been the fate of the artists, quite often, to be the stalking horse for the middle class in the improvement of neighborhoods. By way of perhaps undue generalization, it may be said that artists have been proficient at finding pleasant but inexpensive places, areas that are more or less rundown, and then, by their presence there, upgrading such areas, often through individual rehabilitative efforts. The cycle is defeating. Improvement yields demand, which pushes prices higher. The artists have destroyed their habitats through their own care. A society that seeks to encourage the arts and to have a subculture of painters, musicians, and actors must ensure that a place to work and live is not denied. There is an assumption here that artists are a little like wildlife: they cannot thrive in antiseptic and wonderfully controlled climates, subdivisions with houses all in a row. There is the additional assumption that the kind of area where artists can live and work will die without the direct effort of the state.

Ensuring that there is a demand for the services of artists⁸⁵ is an

it would not be clear that the answer lies in restoring the full fair market value deduction to the artists. Perhaps it would be more equitable to destroy the deduction altogether, or at least to eliminate the deduction for the appreciated value of an object.

82. See 30 RECORD OF N.Y.C.B.A. 586 (1975).

83. Artists, or artists' groups, are fairly single-minded on this question, and well they might be. What is painful is not the effort to obtain a tax break, but the righteousness involved in the effort.

84. Cf. CAL. WELF. & INST'NS CODE §§ 5115-16 (West 1972 & Supp. 1975).

85. In the 1940's, the founder of the Work Projects Administration arts project wrote: "For the first time in American art history a direct and sound relationship has been established between the American public and the artist. Community organizations of all kinds have asked for his work. In the discussions and interchanges between the artist and the public concerning murals, easel paintings, prints and sculptures for public buildings, through the arrangements for allocations of art in many forms to schools and libraries, an active and often very human relationship has been created. The artist has

appropriate government role. Undisturbed, the market does not provide extraordinary incentives for being a serious and creative person, a writer, a poet, or a painter. The question is whether the government can provide more paid positions that afford occupational legitimacy to these roles. What is suggested is a movement away from the grant and award approach, in which the artist is treated like a prized orchid, nourished and protected. Rather, the government should play, in part, the same role that the church and the throne played in patronizing artists. Artists should be hired the way landscapers, decorators, or architects are hired to work on state construction projects. Large bureaucracies, such as the Health and Welfare Department of the State of California, should hire poets or painters who would do their own engineering studies of how to improve the spirit of the state office worker. There should be artists in residence in schools of law and dentistry. There should quite clearly be artists employed in the elementary and secondary school classrooms. These should be artists being artists, inside critics of the madness of complacency, not artists who are hired simply to teach painting or how to read a play.

This welter of issues should not obscure an underlying commitment to a significant and creative role for the state. A society cannot be great without a strong and pluralistic commitment to the arts. The arts help to bring order to our lives. They provide us with a sense of perspective. They enhance our perception of the relations of men and women to each other and to their society. The arts help our people to communicate with each other; they help to provide a record of our society. What are really at stake are new and stronger ways of enhancing our humanity, our sense of the grand and the good, our reaching for harmony and order and hope. A century ago, Andrew Downing wrote that "every outward material form is a symbol" that "acts upon the sense of beauty." In our society, the outward material forms have proliferated, and the sense of beauty has sometimes been dulled.

become aware of every type of community demand for art, and has had the prospect of increasingly larger audiences, of greatly extended public interest. There has been at least the promise of a broader and socially sounder base for American art" H. CAHILL, *NEW HORIZONS IN AMERICAN ART* 29 (1941).